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CITATIONS

639838—45——1

In the Supreme Court of the United States

October Term, 1944

No. 914

Chester Bowles, Administrator, Office of Price Administration, petitioner

v.

Seminole Rock and Sand Company

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The oral opinion of the District Court (R. 181–184) is unreported. The opinion of the Circuit Court of Appeals (R. 191–196) is reported in 145 F. 2d 482.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 14, 1944 (R. 196). The petition for a writ of certiorari was filed in this Court on February 2, 1945. Certiorari was granted on March 12, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the

Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, under Maximum Price Regulation No. 188, a seller's maximum price for a commodity covered by the regulation is the highest price at which he made an actual delivery of the commodity during March 1942 (in a case in which he did make such a delivery during that month), or whether, as the court below held, the seller is permitted by the regulation to charge a higher price at which he merely contracted to deliver in March 1942.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 34, 58 Stat. 640, 50 U. S. C. App. Supp. III and 50 U. S. C. A. App., Sec. 925 (e)), and Maximum Price Regulation No. 188 (7 F. R. 5872 *et seq.,* 7967, 8943), issued under Section 2 (a) of that Act.

As originally enacted, Section 205 (e) read:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price

whichever is the greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

As amended by Section 108 (b) of the Stabilization Extension Act of 1944 (Pub. L. No. 383, 78th Cong., 2nd Sess., June 30, 1944, 58 Stat. 640, 50 U. S. C. A. App., Sec. 925 (e)), the Section now provides:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the

violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to

bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action, for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Section 108 (c) of the Stabilization Extension Act of 1944 (50 U. S. C. A. App., note following Sec. 925 (g)):

The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.

The pertinent provisions of Maximum Price Regulation No. 188 (7 F. R. 5872), as amended

(7 F. R. 7967, 8943), which establishes maximum prices for building materials (including crushed stone) and consumer durable goods other than apparel, are as follows:

SEC. 1499.151. *Applicability of the General Maximum Price Regulation.*—The provisions of secs. 1499.1 to 1499.3, inclusive and sec. 1499.18, of the General Maximum Price Regulation shall not apply to sales or deliveries by manufacturers of certain building materials and of certain consumers' goods set forth in sec. 1499.166, Appendix A, of this Maximum Price Regulation No. 188. All other sections of the General Maximum Price Regulation, together with existing and subsequent amendments and supplementary regulations, shall apply to sales and deliveries by such manufacturers, and are hereby incorporated by reference into this Maximum Price Regulation No. 188.

SEC. 1499.153 (a). *Articles priced in March 1942.*—The maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March 1942 (as defined in Sec. 1499.163), for the article.

* * * * *

SEC. 1499.163 (a) (2). "Highest price charged during March 1942" means:

(i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or

(ii) If the seller made no such delivery during March, 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or

(iii) If the seller made no such delivery and had no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers. * * *

(4) "Purchaser of the same class" and "class of purchaser" refer to the practice adopted by the seller in setting different prices for commodities for sales to different purchasers or kinds of purchasers (for example, manufacturer, wholesaler, jobber, retailer, government agency, public institution, individual consumer) or for purchasers located in different areas or for different quantities or under different conditions of sale.

Section 1499.20 (d) of the General Maximum Price Regulation, 7 F. R. 3156, incorporated by reference into Maximum Price Regulation No. 188 by Section 1499.151, *supra*, reads as follows:

Delivered.—A commodity shall be deemed to have been "delivered" during March 1942, if during such month it was received by the purchaser or by any carrier, includ-

ing a carrier owned or controlled by the seller, for shipment to the purchaser.

STATEMENT

Respondent is a manufacturer of crushed stone and similar commodities subject to Maximum Price Regulation No. 188. The highest price which it charged for crushed stone actually delivered in March 1942 was 60¢ a ton. The delivery was made to the Seaboard Air Line Railway in pursuance of a contract executed in the fall of 1941. (R. 182–183, 185; cf. R. 116, 13, 5–6). After the effective date of Maximum Price Regulation No. 188, respondent sold to the same purchaser for use in the maintenance of its roadbed, 25,239.25 tons at 85¢ a ton and 92,316.15 tons at $1.00 a ton (R. 185). The sales were made despite the fact that on July 3, 1942, Seaboard had written respondent calling attention to the fact that under the regulations issued by the Office of Price Administration it was unlawful for it to pay to respondent a higher price for crushed stone than the highest price at which respondent sold or offered to sell the same or similar commodity in March 1942 (R. 160), and that respondent had replied saying: "* * * we beg to advise that the highest price at which we sold ballast in March 1942 was seventy-five cents (75¢) per ton" (R. [illegible]1).

Alleging that the highest price at which respondent could lawfully sell crushed stone of the kind sold to the Seaboard was 60¢ a ton, peti-

tioner brought this action to enjoin respondent from violating the Act and regulation, and to recover from respondent a judgment under Section 205 (e) of the Act for three times the amount by which the sales prices of the crushed stone sold by the respondent to Seaboard after the effective date of the regulation exceeded 60¢ per ton.[1] By way of defense, respondent showed that in January of 1942 it had contracted to sell crushed stone to V. P. Loftis Company, a government contractor engaged in the construction of a dam for the government at Stuart, Florida, for $1.50 a ton to be delivered by respondent by barge at the dam site as called for.[2] (R. 20–21, 185.) The contract pro-

[1] Section 205 (e) as originally enacted (*supra*, pp. 2–3) provided that any one selling a commodity at a price in excess of that permitted by a regulation should be liable for three times the amount of the overcharge—to the buyer if the commodity was purchased for use or consumption other than in the course of trade or business, otherwise to the Administrator. As amended by Section 108 (b) of the Stabilization Extension Act of June 30, 1944 (*supra*, pp. 3–5) the section provides that the seller's liability shall be restricted to the amount of the overcharge if he proves that the violation of the regulation was neither wilful nor the result of a failure to take practicable precautions against the occurrence of the violation. By the express terms of the Stabilization Extension Act (*supra*, p. 5), this amendment is made applicable to pending actions. The respondent therefore will be entitled to the benefit of the amendment in the event of a reversal. Cf. *Bowles* v. *Franceschini*, 145 F. 2d 510 (C. C. A. 1); *Bowles* v. *Hasting*, 146 F. 2d 94 (C. C. A. 5).

[2] The price called for in the contract with the government contractor was $2.50 a ton. The excess of that price over $1.50 a ton was intended to cover transportation charges. (R. 15.)

vided for the sale of two different kinds of stone, one of which respondent claimed was the same or substantially the same as that delivered the Seaboard in March 1942, and the other of which respondent admitted was different (R. 15–17). No delivery was made under this contract in March 1942 (R. 185). A small part of the stone subject to this contract was delivered in January of 1942, but the stone so delivered was conceded by respondent to be a different stone from that sold to Seaboard (R. 15–16). The balance of the stone subject to the contract, including all of the stone which respondent claimed was the same as that sold to Seaboard, was not delivered until August of 1942 (R. 185). Immediately upon entering into the contract with the government contractor, however, respondent proceeded to build two stock piles from which it intended to make deliveries under the contract (R. 31–32). All or a portion of the stone in at least one of these piles—the one containing stone which respondent claimed was the same as that delivered to the Seaboard in March 1942—was sold and delivered to the Seaboard, and not to the government contractor (R. 16, 17, 33).

The district court dismissed the action on two grounds: (1) That the purchaser and not the Price Administrator was vested with whatever cause of action existed to recover a judgment under Section 205 (e) of the Act; and (2) that \$1.50 a ton, the price at which respondent had contracted to sell crushed stone to the govern-

ment contractor, and not 60 cents a ton, the highest price at which respondent had actually delivered crushed stone in March 1942, was the maximum price at which respondent could lawfully sell that commodity under the regulation (R. 186).[3]

The Circuit Court of Appeals held that whatever cause of action existed under Section 205 (e) because of the alleged over-the-ceiling sales was vested in the Administrator and not in the purchaser; but that the price called for by an executory contract under which the purchaser was entitled to demand delivery in March 1942 was a price charged for delivery in March 1942 within the meaning of Section 1499.163 (a) (2) (i) of the regulation, and that therefore $1.50 a ton and not 60 cents a ton constituted respondent's maximum price for crushed stone under the regulation (R. 191–196). Accordingly, it affirmed the judgment of the district court (R. 196).

[3] The District Court denied the Administrator's application for an injunction to restrain respondent from violating the Emergency Price Control Act because it was of the opinion that operation of the railroad would be impeded if it could not purchase ballast from respondent and respondent could not furnish ballast at the ceiling price without incurring a loss (R. 183–184). On appeal petitioner contended that the denial of an injunction for this reason was an abuse of discretion. Cf. *Lenroot* v. *Interstate Bakeries Corp.*, 146 F. 2d 325 (C. C. A. 8). The Circuit Court of Appeals, having decided that respondent had not violated the regulation, did not reach the question.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that the price called for by an executory contract under which the purchaser was entitled to demand delivery in March 1942 constituted a "price charged for delivery in March 1942" within the meaning of the regulation, even though there was no actual delivery under the contract in March 1942, but was an actual delivery at a lower price.

2. In affirming the judgment of the district court.

SUMMARY OF ARGUMENT

The maximum price regulation applicable to respondent's stone provides that the price ceiling shall be the highest price charged by the seller for delivery of the same commodity during March 1942, but that if no delivery was made during that month, the ceiling should be the highest offering price during the month. "Delivered" is defined in the regulation as meaning "received by the purchaser." The decision below that respondent's ceiling was not the highest price for stone received by the purchaser in March but the price fixed in a pre-existing contract under which no stone was delivered during that month is inconsistent with the plain terms of the regulation. The literal construction of the regulation is supported by a consistent and repeatedly reaffirmed administrative interpretation of this and similar

regulations upon the basis of which a vast amount of business has been transacted. The weight to be given to the Administrator's construction of his own regulation is obviously very great.

To the extent that the decision below was based upon the court's view that the regulation as interpreted by the Administrator was unreasonable and inconsistent with the statutory grant of authority, the court below invaded the province vested by Congress in the Emergency Court of Appeals, which alone has authority to determine whether a regulation comports with the statutory standards. The court also failed to give any consideration to the reasons which underlay the regulation, which show that it was a reasonable and necessary means of carrying out the statutory policy.

ARGUMENT

The Highest Price at Which a Seller Actually Delivered a Commodity in March 1942 Constitutes His Maximum Price for That Commodity

A. THE LANGUAGE AND ADMINISTRATIVE INTERPRETATION OF THE REGULATION

Section 1499.153 (a) of the regulation provides that "the maximum price for any article which was delivered or offered for delivery in March 1942, by the manufacturer, shall be the highest price charged by the manufacturer during March, 1942 (as defined in Sec. 1499.163) for the article."

Section 1499.163 provides that for the purpose of the regulation—

> "Highest price charged during March 1942" means:
>
> (i) The highest price which the seller charged to a purchaser of the same class for delivery of the article or material during March 1942; or
>
> (ii) If the seller made no such delivery during March 1942, such seller's highest offering price to a purchaser of the same class for delivery of the article or material during that month; or
>
> (iii) If the seller made no such delivery and has no such offering price to a purchaser of the same class during March, 1942, the highest price charged by the seller during March, 1942, to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers; * * *.

The regulation thus establishes a succession of three rules for determining the maximum price of any article. First, the seller is to take as his maximum price of any commodity to a purchaser of any class the highest price which he charged for a delivery of the same commodity to a purchaser of the same class in March 1942. Secondly, in the absence of such a delivery in March, he is to take his highest offering price to a purchaser of the same class for delivery of the same article during March 1942. Thirdly, in the absence of both such a delivery and offering price, he is to

take the highest price charged to a purchaser of a different class during March 1942, adjusted to reflect the seller's customary differentials between the two classes of purchasers.

As the regulation shows on its face, the three rules which it prescribes are mutually exclusive. The first clause—that the seller must take as his maximum price for any commodity to a purchaser of any class the highest price at which he delivered the same commodity to a purchaser of the same class in March 1942—must be applied if any deliveries were made during the month. Only if the first clause is inapplicable may the second clause be applied, and only if both the first and second clauses are inapplicable may the third be applied. Since the first clause applies where there has been a delivery, and the second, which relates to the "offering price," only where there has been no delivery, it is clearly improper to use the offering price as the ceiling when there was an actual delivery during the month of March.

The court below held to the contrary, however, at least where the offer was under the terms of a preexisting contract; it construed the phrase "charged * * * for delivery" as embracing not only charges for actual deliveries but all charges for delivery offered under such contracts even though not actually made (R. 195).

The court apparently assumed that it was free to construe the language of the regulation as it

saw fit. It did not advert to the definition of "deliver" in General Maximum Price Regulation, Sec. 1499.20 (d), incorporated by reference into Maximum Price Regulation 188, by Sec. 1499.151 (quoted. (*supra* p. 6). "Delivered" is therein defined as meaning "received by the purchaser or by any carrier * * * for shipment to the purchaser" during March 1942. This definition is, of course, a part of the regulation. It makes it plain that there is no delivery unless a commodity is actually received by the purchaser or by the carrier for shipment to him. *Brown* v. *Mars, Inc.*, 135 F. 2d 843, 856 (C. C. A. 8), certiorari denied *sub nom. Mars, Inc.* v. *Bowles*, 320 U. S. 798. Even if there should be a question as to the ordinary meaning of delivery, the definition embodied in the regulation itself is obviously controlling. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 95–96; *Marlene Linens* v. *Bowles*, 144 F. 2d 874 (Em. Ct. App.). The definition leaves no room for any such concept of constructive delivery as is embodied in the opinion below. A commodity is not received by the purchaser in March by reason of the existence of an executory contract under which no shipments during the month are made.

The settled administrative construction has followed the plain meaning of the regulation. Concurrently with the issuance of the General Maximum Price Regulation, the Administrator

published a bulletin entitled "What Every Retailer Should Know About the General Maximum Price Regulation," more than a million copies of which were ultimately distributed to the public. On pages 1 and 2 of the bulletin, which was in substantial part applicable and also made available to wholesalers and manufacturers, the following explanation was given concerning the issue now before this Court (the italics are contained in the original):

> The highest price charged during March means the highest price which the retailer charged for the article *actually delivered* during that month, or, if he did not make any delivery of that article during March, then his *highest offering price* for delivery of that article during March * * *:
>
> Each retailer should apply the following *tests in the order set forth.* If his maximum price can be established for an article under the first test, the retailer need look no further. Only if the price cannot be determined under the first test, may he go on to the second test, and only if it cannot be determined under the first and second tests, may he go on to the third test, and so on.
>
> *First Test: Same Article Delivered in March (Sec. 2 (a) (1))*
>
> *The retailer must take as his maximum price for sales of an article after May 18 the highest price at which he delivered the same article during March 1942.* This

is the basic test and the one that will be applicable in the majority of cases. It should be carefully noted that *actual delivery* during March, rather than the making of a sale during March, is controlling.

While the bulletin deals with the General Maximum Price Regulation, it is equally applicable to Maximum Price Regulation No. 188. As said by the Emergency Court of Appeals in *United States Gypsum Company* v. *Brown,* 137 F. 2d 360, 362, "under both regulations the highest price charged by a manufacturer for any article delivered by him in March, 1942, became his maximum price." In fact, in the statement of considerations which accompanied Maximum Price Regulation 188, (see 7 F. R. 5873) as required by Section 2 (a) of the Act, he categorically stated that the regulation established "at the identical level of the General Maximum Price Regulation, maximum prices for articles dealt in during March, 1942." Only in respect to commodities not dealt in during March 1942 was the regulation intended to prescribe different maximum prices from those prescribed by the General Maximum Price Regulation.

The administrative construction adopted at the beginning has been consistently and repeatedly reaffirmed. The point was deemed to be sufficiently fundamental to be referred to by the Price Administrator in his First Quarterly Report to Congress. In that report the Price Administrator (at p. 40) explained:

> "Highest price charged" means one of two things: (1) It means the top price for which an article was *delivered* during March 1942, *in completion of a sale to* a purchaser of the same class * * * (2) If there was no *actual delivery* of a particular article during March, the seller may establish as his maximum price the highest price at which he offered the article for sale during that month. [Italics supplied.]

The same position has been uniformly taken in explanations and interpretations given to particular inquirers affected by the regulations. In view of the overriding importance of definiteness and certainty in the application of maximum price regulations, the Price Administrator early adopted the practice of issuing in writing, on request of any affected persons "official interpretations" of his regulations upon which the recipient is entitled to rely unless and until revoked.[4] Thousands of such interpretations have been issued. Many more informal explanations have been given. It is impossible to say how many of these interpretations and explanations dealt with or assumed the point here in issue, but in view of the fundamental character of the point they must have been numerous.

By the process which has been described, the established construction of the Price Administrator has been woven into the fabric of the regu-

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[4] Revised Procedural Regulation No. 1, Section 54, 7 F. R. 8961, as amended 9 F. R. 10476.

lation. Millions upon millions of individual transactions have been settled upon the basis of it. That construction can thus claim for itself all the weight to which settled practice in human affairs is entitled. It is supported not merely by the presumed expertness of an administrative agency in determining the meaning of its own regulation. It is supported, even more importantly, by the fact that it has been outstanding and constantly applied and reapplied in innumerable transactions.

The court below in its opinion did not even refer to this settled administrative construction of the regulation but alluded to the Price Administrator's view as if it were a position taken for the first time in this lawsuit. The court then proceeded to discuss the language of the regulation and impressed its own gloss upon it. This was plain error. Whatever qualifications there may be upon the rule which attributes weight to a settled administrative construction, such a construction cannot be ignored even when it involves only the Administrator's views as to the meaning of the statute under which he is operating. *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 137–140. The weight to be given to his construction of his own regulations should obviously be much greater; for then he is explaining his own intention, not that of Congress. This Court has gone so far as to say that the latter type of "interpretation is binding upon the courts." *Federal Communica-*

tions Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143n.; cf. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 325; *American Tel. and Tel. Co.* v. *United States*, 299 U. S. 232, 242; *Morgan Stanley & Co.* v. *Securities Exchange Commission*, 126 F. 2d 325 (C. C. A. 2).

It is not necessary to go that far here, however, inasmuch as the construction adopted by the court below is wholly without merit. As has been seen, the language of the regulation compels the construction placed upon it by the Price Administrator.

B. THE COURT IMPROPERLY INVADED THE JURISDICTION OF THE EMERGENCY COURT OF APPEALS

The decision below was clearly based upon the court's view that the Administrator's interpretation was "unreasonable" and "antagonistic to the letter and spirit of the Act" (R. 195). In being guided by such considerations the court seems to have been concerned with how the administrative discretion should have been exercised in order to conform to the statute, and not with what the Administrator's regulation was intended to mean. The court's sole function, however, was to interpret the regulation—that is, to give it the meaning which the Administrator intended it to have. The task of determining whether a regulation conforms to the statutory standards was assigned exclusively to another tribunal, the Emergency Court of Appeals. Cf. *United States* v. *Pepper*

Bros., 142 F. 2d 340 (C. C. A. 3); *Rosensweig* v. *United States*, 144 F. 2d 30 (C. C. A. 9), certiorari denied, No. 442, November 6, 1944; *Bowles* v. *American Brewery*, 146 F. 2d 842 (C. C. A. 4).

Inasmuch as the court below necessarily was required to interpret the regulation, it may be conceded that the court had authority to make use of the general principles relating to the construction of documents. This would permit the court to consider, as an aid to interpretation, the reasonableness or absurdity, and the legality, of the alternative constructions. But those factors are only a few among many to be given weight; the ultimate criterion is the intention of the writer of the document—in this case the Administrator. When the interpreting court proceeds to determine what the Administrator meant in disregard of the language he employed and the Administrator's own interpretation, because of its views as to the lawfulness of the regulation under the statute, it would seem to be invading the province of the Emergency Court. This, we submit, is what was done here.

Furthermore, although the court's judgment seems to have been based on its views as to the fairness and reasonableness of the Administrator's interpretation, it failed even to refer to the reasons which support the Administrator's action. As we shall show, there is abundant support for the fairness and reasonableness of the Adminis-

trator's deliberate conclusion that prices on actual deliveries in March should be the primary basis for the maximum price regulation.

The court said only that it is "a superficial basis" for the fixing of maximum prices that "one purchaser [having a contract at a lower price] chanced to require a delivery in March and the other [having a contract at a higher price] did not." (R. 194.) The court said that this is not "fair and equitable", as required by the statute. It is obvious, however, that a large element of chance is inseparable from any regulation fixing a maximum price at the price charged in some past period; this most assuredly does not invalidate such a regulation. *Wilson* v. *Brown,* 137 F. 2d 348 (Em. Ct. App.); *Northwood Apts., Inc.* v. *Brown,* 137 F 2d 809 (Em. Ct. App.); *United States Gypsum Co.* v. *Brown,* 137 F. 2d 803 (Em. Ct. App.). Indeed the element of chance plays a large part in the operation of almost every general rule. It can seldom if ever be eliminated. As Mr. Justice Cardozo observed in *Fox* v. *Standard Oil Co.,* 294 U. S. 87, 102:

> * * * If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict.

The Administrator's conclusion was reached only after careful study and in the light of definite and compelling considerations. In the first place,

in the interest of certainty and the preservation so far as practicable of current price relationships, a base period of a month was deemed to be the maximum which was feasible. Transactions both before and after that month were, therefore, to be disregarded. In the second place, if mere offers or unconsummated contracts in force during that month were to be taken into account, it would be necessary to consider such intangible factors as the intent and bona fides of the parties, making enforcement difficult and introducing the possibility of easy evasion. Such transactions were, therefore, to be relied upon only in the absence of a definite and consummated delivery. In the third place, and most important of all, establishment of maximum prices on the basis of March delivered prices was necessary to preserve a semblance of the normal spread between prices at the various stages of production and distribution. One of the most intractable of the problems arising from the freezing of prices simultaneously at all levels of production and distribution was the avoidance or minimizing of a "squeeze" resulting from the lag in advancing prices as between one stage of production or distribution and the next. This problem was discussed by the Price Administrator in his first quarterly report to the Congress. What he said disposes conclusively of any suggestion that his determination with respect to the issue involved was unreasonable (pp. 43–44):

Many of the goods sold at retail in March were stocked at an earlier period when wholesale costs were lower than the levels reached in that month. In the case of slow-moving merchandise and seasonal goods, this spread between the prices at which goods have been acquired and the prices at which they can be replaced under the March ceiling is considerable. In the course of time, as retailers are compelled to replace their merchandise, their margins—the spread between their cost of merchandise and their selling price—will be reduced.

* * * * *

Some relief is provided in these cases by the use of March *delivered* prices in the ceiling regulations, as distinguished from prices *quoted* in March. The use of delivered prices automatically rolls back the squeeze in some degree. This is because goods delivered in March were in many cases ordered weeks and even months earlier and hence bore the prices that prevailed at the time the orders were placed. It was these prices that the regulation established as maximum, not the quoted March prices.

This delivered price provision was adopted at the suggestion of retailers. Its effect is to roll back the squeeze on a selective basis. The relief resulting from the provisions is least where turnover was rapid and inventories were small, that is, in the case in which retail prices were based upon replacement cost and where need for

> relief is therefore slight. The relief is greatest where turnover was slow and inventories were large, that is, where the difference between inventory and replacement cost is greatest and where the need for relief is acute.

See also Price Administrator's Second Quarterly Report, p. 27.

C. THE DECISION OF THE COURT BELOW IF ALLOWED TO STAND WILL INJURIOUSLY AFFECT THE STABILIZATION PROGRAM

An understanding of the crucial relation of the issue presented by this case to the structure of wartime price control requires a brief review of the development of that structure.

Prior to April 28, 1942, price control was selective in nature, applying only to certain named commodities each of which had been singled out and brought under control in a separate price schedule or maximum price regulation. The commodities thus selectively controlled accounted for approximately half of the total volume of sales in the economy at the wholesale level. On April 28, 1942, the Price Administrator, finding that the developing inflation could not be curbed by such piecemeal action, issued the General Maximum Price Regulation which at one stroke brought under control (with relatively minor exemptions) the entire balance of the economy.

Action of such breadth required the development of new techniques of price control which had

no close parallel in the regulations previously issued. The general method adopted was a "freeze" of all prices at the level, or in line with the level, of the highest prices charged by each individual seller in March 1942. So simple a formula, however, would not suffice to identify for each seller, with the requisite precision, the particular price, in a month of changing prices, which was thereafter to serve for each particular type of commodity and transaction as his maximum price. Detailed pricing rules accordingly had to be worked out. The rules thus established have remained in force ever since.

The General Maximum Price Regulation itself has been continued in effect as the basic regulation applicable to every commodity which has not been either specifically exempted from price control or subjected to a specialized maximum price regulation. Since April 28, 1942, a large number of such specialized regulations have been issued, each of them removing a commodity or group of commodities from the coverage of the General Maximum Price Regulation. Many of these specialized regulations adopted different techniques of control—such as the naming of specific dollars-and-cents prices or the prescription of a cost-plus-a-margin formula—which were considered to be better adapted to the particular commodity field involved. The que. :on involved in the present case does not arise under these regulations. Others of the specialized regulations, however,

continued to make use of the "freeze" method of control. These regulations for the most part adopted the basic pricing provisions of the General Maximum Price Regulation. The regulation here involved—Maximum Price Regulation No. 188—is one of this number. All told, there are 47 such regulations, in which the present question arises in the determination of maximum prices. The ruling of the court below, if approved, would be controlling in the construction of all these regulations.

The commodities covered by these regulations are too numerous to be listed. An idea of their number and importance can be secured from the titles of the specialized regulations which are quoted in the margin.[5] Among the commodities covered by these regulations of the type here in-

[5] This group is made up of the following numbered regulations excluding No. 188: 224, Cement; 261, Finishing Hardware; 17, Pig Tin; 248, Manganese Ore; 314, Magnesium and Magnesium Alloy Ingot; 316, Coated and Bonded Abrasives; 327, Certain Non-metallic Minerals; 347, Mica; 405, Ferro Silicon; 489, Tungsten, Vanadium, Molybdenum, Cobalt and Other Alloys and Minerals; 497, Antimony Metal and Antimony Compounds; 220, Misc. Rubber Commodities; 300, Rubber Drug Sundries; 403, Rubber Commodities Purchased for Government Use; 477, Rubber Heels and Soles; 129, Converted Paper Products; 225, Printed Paper Commodities; 266, Toilet Tissue and Paper Towels; 449, Groundwood Specialty Papers; 450, Writing Paper; 451, Book Paper; 445, Distilled Spirits and Wines; 193, Domestic Distilled Spirits; 259, Domestic Malt Beverages; 154, Ice; 260, Cigars; 121, Solid Fuels; 177, Men's and Boys' Tailored Clothing; 332, Men's and Boys' Shirts and Pajamas; 36, Ace-

volved are household wares, furniture, household appliances and other consumer durable goods, a large percentage of all clothing, solid fuels, virtually all building materials, and countless chemicals, drugs and industrial materials. They comprise over a quarter of all commodities subject to price control.

The issue involved in the present case is fundamental in the determination of individual sellers' maximum prices under all of these regulations. All of them provide a series of pricing rules, the first three of which are generally identical with those involved in this case. Sellers are to apply the first rule if it is applicable. Only if the first rule cannot be applied may they apply the second. Only if the first and second rules cannot be applied may they apply the third, and so on. The various pricing rules were arranged in a carefully planned progression, with a view to their relative fairness and reliability and the effect of their application upon the price structure generally.

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tone; 37, Butyl Alcohol; 170, Anti Freeze; 179, Pine Oil; 282, Private Formula Drugs and Cosmetic Products; 392, Packaged Drugs; 393, Packaged Cosmetics; 391, Household Soaps and Cleansers; 406; Synthetic Resins and Plastic Material; 472, Essential Oils; 447, Coal Tar; 543, Certain Barium Chemicals; 157, Sales and Fabrication of Textiles Apparel and Related Items for Military Purposes. The following Revised Maximum Price Regulations: 206, Vitrified Clay Products; 138, Ferro, Manganese and Manganese Alloys and Metals; 198, Silver; 131, Camelback and Tire and Tube Repair Materials; 180, Colored Pigments; and Revised Price Schedule 40, Builders' Hardware.

Sellers were not permitted to pick and choose among the various rules in order to apply the one which gave them the highest price. Each succeeding rule was put in the regulation not as an optional pricing method, but in order to deal with some situation not covered by any preceding rule and as part of a plan designed to avoid any situation in which, for the lack of any applicable rule, no maximum price could be established.

The decision of the court below confuses this basic concept of a planned sequence of pricing rules. It does so at the crucial point of demarcation between the very first of the pricing rules and the second. Thus every maximum price which has been established under the first and primary pricing method laid down in the regulation and others of the same type is at least potentially unsettled.

The first three of the pricing rules established in these regulations constitute an initial and basic group which should be explained together. This first group of rules applies where there was a transaction in March 1942 by the *same seller* in the *same commodity.* Given these conditions, there is a sequence of three rules. *First,* the seller is to take as his maximum price the highest price on an *actual March delivery* to a purchaser of the same class. *Second,* failing such a delivery he is to take the highest offering price for March delivery to a purchaser of the same class. *Third,*

failing such a delivery or offering price, he is to take the highest price on an *actual March delivery* to a purchaser of a different class, adjusted to reflect the seller's customary differential between the two classes of purchasers.

The decision of the court below in effect merges the second of the foregoing rules, or part of the second, with the first. It does this by construing the word "delivery" in the regulation to include not only actual delivery in March 1942 but some indeterminate range of contracts or offerings for March delivery. The result of the decision is to give a seller the benefit of any higher prices which he could establish on the basis of such unconsummated contracts or offerings, which properly can be considered only under the second rule, even though, since actual March deliveries were made, it is only the first rule which is applicable.

It is obviously impossibe to demonstrate how many sellers of commodities covered by regulations of the type under consideration may have had offering prices for delivery during March 1942 (or prices fixed in contracts in force in that month under which such deliveries might have been made) higher than any prices at which deliveries were actually made during the month. Common knowledge, however, will indicate that the number must be very large. New offering prices and new contracts are constantly being made. In March 1942,

as this Court will judicially notice,* prices were steadily rising. Thus the average of prices on forward-looking offers and contracts was higher than the average of prices on actual deliveries. At the same time the upward surge of prices accentuated the normal number of new quotations on transactions not yet actually consummated. In all these situations, the decision of the court below has unsettled established prices—prices which have been in effect for more than two years. If approved, it will result in higher prices which are indeterminate in extent and amount but which will evidently have serious consequences for the stabilization program.

CONCLUSION

It is respectfully submitted that the judgment should be reversed and the cause remanded for further proceedings.

CHARLES FAHY,
Solicitor General,
ROBERT L. STERN,
Special Assistant to the Attorney General.
HENRY M. HART, JR.,
Associate General Counsel,
FLEMING JAMES,
DAVID LONDON,
ALBERT M. DREYER,
Office of Price Administration.
APRIL 1945.

* *Central Kentucky Natural Gas Co.* v. *Railroad Com'n*, 290 U. S. 264; *Banton* v. *Belt Line Ry. Corp.*, 268 U. S. 413; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388; *Lincoln Gas & Electric Co.* v. *Lincoln*, 250 U. S. 256.

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